

MINUTES OF THE OPEN SESSION OF THE RHODE ISLAND ETHICS COMMISSION

July 19, 2011

The Rhode Island Ethics Commission held its 11th meeting of 2011 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, July 19, 2011, pursuant to the notice published at the Commission Headquarters, the State House Library, and electronically with the Rhode Island Secretary of State.

The following Commissioners were present:

Ross Cheit, Chair Mark B. Heffner

Deborah M. Cerullo SSND, Vice Chair Frederick K. Butler

J. William W. Harsch, Secretary John D. Lynch, Jr.

James V. Murray

Also present were Edmund L. Alves, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason Gramitt and Amy C. Stewart; Commission Investigators Steven T. Cross, Peter J. Mancini and Gary V. Petrarca; and Commission Administrative Assistant Tracy A. Teixeira.

At 9:05 a.m. the Chair opened the meeting. The first order of business was a motion to approve minutes of the Open Session held on June 21, 2011. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Butler, it was unanimously

VOTED: To approve minutes of the Open Session held on June 21, 2011.

The next order of business was advisory opinions. The advisory opinion was based on a draft advisory opinion prepared by the Commission Staff for review by the Commission and was scheduled as an item on the Open Session Agenda for this date. The advisory opinion was that of the Honorable Angel Tavares, the Mayor of the City of Providence. Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was present along with Jeffrey Padwa, Esq. Staff Attorney Stewart noted two factual corrections to the draft: 1) only one party is interested in purchasing the property; and 2) all of the funds involved are federal funds, and no funding derives from the City's Revolving Fund.

In response to Commissioner Cerullo, Attorney Padwa informed that the Board members serve staggered three year terms and that some members would be up for reappointment during the Petitioner's term. The Petitioner stated that the Director of Planning, Tom Deller, previously informed him of the potential sale, which has yet to come before the Board, but that he has had no involvement. He stated that

Mr. Deller advised him this morning that the potential buyer is an organization in New York. In response to Chair Cheit, the Petitioner represented that the PEDP is deciding whether or not to issue a loan that will be used by the entity to purchase the property. He indicated that the PEDP would be looking at whether it makes sense for economic development in the City. In response to Chair Cheit, the Petitioner stated that he does not believe that the issue of the restraining order would be a factor considered by the PEDP, which would be looking at whether the sale is beneficial for the City and if the borrower has the capacity to repay the loan.

In response to Commissioner Heffner, the Petitioner stated that he believes he has appointed PEDP members during his term but he is uncertain as to when the current appointments expire. Commissioner Cerullo stated that she would like more information as to why there is only one potential purchaser and why that entity would need the Board's assistance through a loan. She also inquired as to whether the fact that federal funds are involved might have an impact. Staff Attorney Stewart noted that in a recent opinion the Commission allowed the General Treasurer to simply recuse on matters involving Point Judith Capital that appear before the State Investment Commission, even though she appoints some of its members. She stated that the appointments here involve colleagues who can be autonomous without the Petitioner's participation, rather than the appointment of subordinate municipal officials.

Commissioner Butler commented that he is not sure that further information regarding the background leading up to the purchase offer would be helpful. In response to Commissioner Cerullo, Chair Cheet stated that the hardship exception would only apply when an official needs to be able to participate, whereas here the Petitioner is stating that he neither has to nor will participate. He indicated that he would have more questions if there were any reason to believe the terms of the deal would be affected by the restraining order, which does not seem to be the case here. Commissioner Heffner concurred with Commissioner Cerullo's request for additional information. The Petitioner stated that the matter could be continued to the next meeting, at which time he would provide the information requested through the Solicitor.

Commissioner Lynch inquired as to what end the Commission is seeking additional information, given that the Petitioner is representing that he will recuse himself. He stated that it is not within the Commission's purview to say that the PEDP cannot loan funds to the entity. Chair Cheet commented that if the Petitioner has only appointed a couple of members it might make a difference how the issue is viewed. Commissioner Heffner stated that the issue of future appointments goes to the appearance of impropriety issue, and he reiterated that information regarding who the Petitioner has appointed and when members' terms expire would be helpful. Chair Cheet asked for clarification of the charge of the PEDP and what standard it employs in making its decision.

This matter was continued to the next meeting in order to provide the Petitioner with an opportunity to provide additional information.

The next matter was an adjudicative hearing in the matter of In re: Joseph S. Larisa, Jr., Complaint No. 2010-12. The hearing was stenographically recorded and a transcript of the proceeding is available in the Commission Offices. Commission Prosecutor Katherine D'Arezzo represented the People of the State of Rhode Island. The Respondent, Joseph S. Larisa, Jr., was present and acted pro se.

The parties presented a joint stipulation as to facts. The Prosecution read into the record Joint Exhibit 1, which listed the Prosecution's exhibit to be admitted in full as P1. Joint Exhibit 1 was admitted in full. After both parties gave opening statements, the Commissioners questioned both the Prosecution and the Respondent. Both parties gave closing arguments.

At approximately 11:05 p.m., upon motion made by Commissioner Murray and duly seconded by Commissioner Butler, it was unanimously

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4), to wit:

a.) Motion to approve minutes of Executive Session held on June 21, 2011.

b.) To deliberate in the matter of Joseph S. Larisa, Jr., Complaint No. 2010- 12.

The Commission deliberated in Executive Session with only Legal Counsel Alves present. The Commission reconvened in Open Session at 11:38 a.m.

Chair Cheit reported that the Commission took the following actions in Executive Session: 1) unanimously approved minutes of the Executive Session held on June 21, 2011; and 2) in Complaint No. 2010-12, unanimously voted to find that Joseph S. Larisa, Jr. represented the Estate of Marilyn W. Jones before the East Providence Probate Court on March 9, 2010, in violation of R.I. Gen. Laws § 36-14-5(e)(2) and imposed a civil penalty of \$1,000.

The next order of business was a motion to seal minutes of the Executive Session held on July 19, 2011. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Butler, it was unanimously

VOTED: To seal minutes of the Executive Session held on July 19, 2011.

The next order of business was a Commission discussion of a request to initiate rulemaking regarding candidates for public office who seek and obtain a collective bargaining unit's endorsement. Legal Counsel Alves explained the procedure pursuant to Commission Regulation 36-14-1026. He advised that the matter should be scheduled for consideration at the next meeting to either decide to begin rulemaking or deny the request and provide written reasons for the denial. Legal Counsel Alves stated that the Petitioner is entitled to notice as to when the Commission will consider the request and the Commission may, at its discretion, invite the Petitioner or other interested parties to provide oral or written comment.

Commissioner Cerullo stated that she was inclined to invite the Petitioner and other interested parties to participate in the next meeting. Chair Cheit responded that, while he thinks it is important to get feedback from the public, he had some initial concerns regarding threshold issues of constitutional law. He stated that this request might interfere with First Amendment rights to freedom of speech and association. Commissioner Cerullo stated that she would not be comfortable reaching that conclusion without hearing from Legal Counsel and or the public. Chair Cheit agreed.

Commissioner Murray suggested that the Commission should resolve the threshold constitutional concerns first before inviting comment from the Petitioner and the public. In response to Chair

Cheit, Legal Counsel Alves advised that they may consider the constitutional issues raised by this request at the next meeting. Chair Cheit asked the Staff and Legal Counsel for an analysis of First Amendment issues related to this request for rulemaking. Staff Attorney Gramitt stated that the concurrence in the recent United States Supreme Court case, Nevada Commission on Ethics v. Carrigan, addressed some of these issues.

Commissioner Lynch stated that the constitutional issues could be dispositive but, if not, the request could be considered further. Commissioners Harsch and Heffner concurred that this was the most efficient way to proceed. Upon motion made by Commissioner Murray and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To direct Staff and Legal Counsel to analyze whether there are any constitutional barriers to proceeding with this rulemaking request, particularly as to First Amendment rights of Freedom of Speech and Freedom of Association; and to provide notice to the Petitioner that the Commission will be discussing these specific constitutional issues relevant to his request at the August 16th meeting.

The next order of business was a Commission discussion on whether to initiate rulemaking on any of the proposed draft regulations regarding participation in employee contract negotiations.

Commissioner Harsch explained that at the last meeting he had asked the Staff and Legal Counsel to provide more regulatory options for the Commission's consideration, which have been provided, and to identify legal issues that may arise based on the points brought out in discussion at the last meeting.

Chair Cheit stated that it comes back to the fact that the Commission needs to identify a sufficient basis for promulgating this new regulation. Legal Counsel Alves reflected on the history of these issues, starting from the advisory opinions that prompted the original concerns of the Commission. He stated that initially the problem seemed to be that union dues somehow filter down to the union representatives across the bargaining table and the previous advisory opinions seem to sanction that apparent conflict. However, he acknowledged that all of the proposed regulations now before the Commission go beyond that perceived problem.

Legal Counsel Alves stated that the Commission must identify a specific need for the adoption of the new regulation in the record. He suggested that it might be better to go back to the initial issue, identify the situation that is problematic and then attempt to regulate it. For example, the regulation proposed by the Subcommittee could be more narrowly tailored to prohibit participation if any portion of the public official's union dues flows to the labor union with whom the public official is bargaining. Additionally, he suggested adding an exemption whereby the Commission could permit negotiating on a

case by case basis where there was no appearance of impropriety. He opined that the regulation as drafted could be challenged as overbroad.

Executive Director Willever stated that the Staff worked hard to draft regulations based on the Regulation Subcommittee's direction. He said that the Staff reviewed the history of this matter and provided the Commission with four (4) additional regulations that were originally drafted by former Staff Attorney Esme DeVault. He reiterated that the Staff is committed to facilitating the Commission's work through drafting to ensure that the regulations meet the hurdles of the Administrative Procedures Act ("APA").

Commissioner Butler noted that the Commission recognized that the advisory opinions no longer provided sufficient guidance to the public as to the Commission's position on this matter, therefore the Commission decided to proceed with regulation to put the public on clear notice. Legal Counsel Alves stated that the problem needs to be specific conduct that the Commission sees as a conflict which needs to be regulated. Chair Cheit responded that the more they talk about this issue the more complicated it seems. He said that perhaps it is simply too hard to regulate in a way that makes sense and suggested that the Commission could change course through advisory opinions, in which it could address the appearance of impropriety, even though it is not the best way to put the public on notice.

Commissioner Cerullo asked Legal Counsel Alves to provide his suggested revisions to the Subcommittee's draft regulation in writing.

She stated that it should be clear to the public that the Commission changed position. Chair Cheit reiterated that the Commission needs to identify the behavior that is the underlying problem. In response to Commissioner Cerullo, Legal Counsel Alves said that the APA requires the Commission to make a finding that the regulation is the least onerous alternative considered, that it is not arbitrary, and that it is addressing some particular situation.

Commissioner Lynch recalled that he rejected the plan to pass a General Commission Advisory ("GCA") because the policy change was such a great departure from the past advisory opinions that he thought it was better to make such a change of course with a regulation. He asked if the Commission ever clearly stated what the problem was. Chair Cheit said that if this is only about appearances and not a real conflict, then the Commission should not adopt a regulation. Commissioner Murray commented that he is not sure what the problem is and what the depth of it is. Commissioner Heffner agreed that the Commission must determine if the rulemaking process is appropriate here before drafting language. Commissioner Butler offered that this process may result in continuing on a case by case basis with advisory opinions.

Chair Cheit asked Staff Attorney Stewart to provide additional

clarification regarding the differences between the four (4) additional regulatory options A, B, C, and D for the next meeting. He directed Staff to include Legal Counsel's version of the Subcommittee's regulation with the materials for the next meeting.

At Chair Cheit's request, the Director's Report and New Business were continued to the next meeting. At 12:21 p.m., upon motion made by Commissioner Lynch and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To adjourn.

submitted,

Respectfully

Harsch

J. William W.

Secretary